

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEVEN GARRIS, <i>ET AL</i> ,	§	
<i>Plaintiffs</i> ,	§	
v.	§	Civil Action H-04-4276
	§	
CONTINENTAL TIRE NORTH AMERICA, INC.,	§	
<i>Defendant</i> .	§	

ORDER

Defendant has filed a motion to limit plaintiffs' expert testimony (Dkt. 56). Defendant argues that plaintiffs, without good cause, failed to provide expert reports in accordance with the scheduling order governing this case. Defendant further argues that even if plaintiffs' experts needed further testing in order to finalize their opinions, the experts hold certain opinions that are not dependent on the testing and could have been provided timely. One expert, Steven A. Schlosser, is an accident reconstructionist whose opinions, defendant contends, are wholly independent of any tire testing.

By agreement, plaintiffs' expert reports were due June 30, 2005. On July 6, 2005, plaintiffs' filed an opposed motion to permit their experts to conduct certain testing of the tire that allegedly caused the accident in which Susan Garris was killed. While that motion was pending, the parties sought and received a continuance of the trial of this matter from the November/December 2005 trial term to the May/June 2006 trial term. At the same time, the discovery and motions deadlines were extended into early 2006.

On August 22, 2005, this court issued an order permitting plaintiffs to conduct testing (Dkt. 62). In that order, the court also ordered plaintiffs to submit expert reports 15 days

after the conclusion of testing, and set the deadline for defendants to submit expert reports 45 days thereafter. The August 22, 2005 order effectively renders defendant's current motion moot.¹

Untimely submission of expert reports after the deadlines granted in the court's scheduling order is guided by Rule 16 of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 16(b) governs amendment of pleadings once a scheduling order has been issued by the district court. Rule 16(b) provides that a scheduling order 'shall not be modified except upon a showing of good cause and by leave of the district judge.' The good cause standard requires the 'party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.

Southwestern Bell Telephone Co. v. City of El Paso, 346 F.3d 541, 546 (5th Cir. 2003) (citing *S & W Enters., LLC v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003) (quoting 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1522.1 (2d ed. 1990))). The Fifth Circuit added: "In determining good cause, we consider four factors: '(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.'" *Id.* at 546 (citing *S & W Enterprises*, 315 F.3d at 535).

It is true that plaintiffs did not move to extend the expert report deadline until approximately one week after that deadline passed. However, it is clear that negotiations

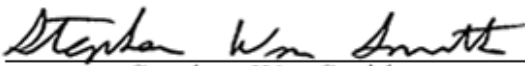
¹ Defendant's motion was filed, but not yet ripe, at the time the court issued the August 22, 2005 order.

between the parties regarding testing the tire were ongoing at that time. Given the hotly contested dispute over testing, it is clear that plaintiffs did not simply disregard the court's scheduling order. It is quite possible, as defendant contends, that certain opinions held by plaintiffs' experts are not dependent on the testing, and this is particularly true as to the opinions of Schlosser. Nonetheless, it was not unreasonable for plaintiffs to seek one deadline for submitting all expert reports instead of submitting them piecemeal. It may be that an expert will reevaluate his opinion after all of the evidence is in, even if he did not intend to rely on the testing.

Extension of the deadline is extremely important to plaintiffs' case because plaintiff bears the burden to prove that the tire was defective. On the other hand, there is no prejudice to defendant in allowing plaintiffs to submit all of their expert reports at one time. While the plaintiffs' explanation for the delay is not as strong as to Schlosser as it is as to "tire" experts, on balance the four factors the Fifth Circuit has instructed the court to consider weigh in favor of denying the motion to exclude his testimony. Any prejudice that did exist due to the delay has been cured by the significant continuance of all deadlines in the scheduling order. It is therefore

ORDERED that defendant's motion to limit plaintiff's expert testimony (Dkt. 56) is denied.

Signed at Houston, Texas on September 19, 2005.


Stephen Wm Smith
United States Magistrate Judge